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**Issue Date: 16 November 2005**

**CASE NO. 2004-LHC-02050**

**OWCP NO. 18-75254**

***In the Matter of:***

**WILLIAM GRAHAM,**
Claimant,

vs.

**CONTRACTORS LABOR POOL,**
Employer

## DECISION & ORDER APPROVING STIPULATIONS AND AWARDING BENEFITS & ATTORNEY'S FEES

On June 23, 2004, the District Director referred this case to the Office of Administrative Law Judges for formal hearing under the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"). 33 U.S.C. § 901, *et. seq*. On August 3, 2005, a hearing was held in San Diego, California. The Claimant, William Graham, (hereinafter "Claimant") and the Employer, Contractors Labor Pool, (hereinafter, "Employer") appeared for the hearing, and the following exhibits were admitted into evidence: ALJ exhibits 1-8; Claimant's exhibits 1-25; and Respondent's exhibits 1-28. At that time, counsel for the parties entered into stipulations on the record regarding this matter. The parties further agreed that I would resolve any dispute over attorney's fees and costs for services performed before the Office of Workers' Compensation Programs and the Office of Administrative Law Judges. The Stipulations do not appear to be either inadequate or the result of duress. Further, the undersigned has reviewed the Stipulations between Claimant and Employer and finds the same to be in order and supported by the accompanying exhibits. Thus, the undersigned accepts, approves and adopts the Stipulations between Claimant and Employer herein.

### Stipulations

The parties stipulate and I find:

1. There was an employer/employee relationship under the Act at the time of the injury;

2. The claim is covered by the Longshore Act;

3. The claimant suffered injuries to his head, neck, back, and chest on April 21, 2000;

4. The claim was timely noticed and filed;

5. The Employer agreed to pay outstanding medical bills;

6. The Claimant reached maximum medical improvement on July 8, 2003;

7. At the time of the injury, the Claimant's average weekly wage was $744.61;

8. The Claimant was temporarily totally disabled from April 22, 2000, through July 7, 2003, and he has been appropriately compensated for that period of time;

9. The Claimant was permanently totally disabled from July 8th, 2003, through June 29th, 2004;

10. The Claimant was totally partially disabled from July 30th, 2004, through October 15th, 2004, with the residual earning capacity of $341.50 in 2000 wages;

11. From June 30, 2004, until October 15, 2004, the Claimant earned $10 per hour, which equates to a residual earning capacity of $341.50 per week in 2000 wages;

12. From October 16, 2004, until November 17, 2004, the Claimant earned $12.50 per hour, which equates to a residual earning capacity of $426.87 per week in 2000 wages;

13. From November 18, 2004 to the present, the Clamaint has earned $600 per week, which equates to a residual earning capacity of $512.25 per week in 2000 wages;

14. The Claimant has received appropriate medical treatment to date under Section 7 of the Act; and

15. The Claimant remains entitled to medical treatment under Section 7 of the Act.

**Attorney's Fees**

Claimant's counsel petitioned for attorney's fees under Section 28(b) of the LHWCA, predicated on the successful settlement of the Longshore claim.[1] Hearing Transcript at 5. He seeks payment for his work at the hourly rate of $275 for 111.75 hours, and $3,629.85 in costs. Employer's counsel traveled to opposing counsel's office in order to review the file in light of the fee petition. Employer's counsel objected to the following: 1) the minimum incremental billing rate of .25 hours; 2) entries on the fee petition that were not contained in the file; 3)

[1] The claim need not go to a formal hearing in order to entitle the claimant's attorney to a fee award, *Thornton v. Beltway Carpet Service, Inc.,* 16 BRBS 29 (1983).

duplicate entries; 4) entries relating to the civil action; 5) entries in the cost petition that do not include the date when such costs accrued; 6) entries relating to correspondence between the Claimant and the California Insurance Guarantee Association; 7) entries relating to the Claimant's California workers' compensation action; and 8) the cost of a telephone conference. For reasons discussed below, I approve Claimant's counsel's attorney fees at a rate of $250 per hour, except for entries listed on the petition that were not in the file, duplicate entries, and where Claimant's counsel failed to show that work in a collateral action was necessary to the Longshore claim.

*1. Minimum incremental billing rate of .25 hours*

The key issue in any determination of a fee award is whether the request is reasonable. An attorney is entitled to compensation for all necessary work performed. The proper test for determining necessity is whether at the time the attorney performs the work in question the attorney could reasonably regard the work as necessary to establish entitlement. *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981); *Cherry v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 857 (1978).

In *Biggs v. Ingalls Shipbuilding, Inc.,* 27 BRBS 237 (1993), the Board held that the administrative law judge did not err in awarding a fee based on a fee petition that billed in quarter-hour increments. The quarter hour billing method is reasonable and complies with 20 C.F.R. § 702.132. *Snowden v. Ingalls Shipbuilding, Inc*., 25 BRBS 346 (1992); *Neeley v. Newport News Shipbuilding & Dry Dock Co.,* 19 BRBS 138 (1986). *But see Ingalls Shipbuilding, Inc. v. Director, OWCP (Fairley),* 904 F.2d 705 (5th Cir**.** 1990) (finding that a claimant's attorney cannot charge more than 1/8 of an hour to review a single page letter and 1/4 of an hour to draft a single page letter).

Here, Employer's counsel argues that a minimum incremental billing rate of .25 hours leads to an inflated hourly rate because, he alleges, drafting a short letter likely took Claimant's counsel .1 hours rather than .25 hours. Employer's counsel itemized his opponent's letters to show that some of them were only 2 lines long while others had 10 lines. Employer's counsel proposes that the appropriate hourly rate would be either $110 if a minimum incremental billing rate of .25 hours is used, or that the minimum billing increment be reduced to .1 hours for each short letter. Claimant's counsel contends that Employer's counsel did not object to the hourly rate of $275.

Some short letters require more time regardless of the number of lines or sentences. This claim arose in a jurisdiction where quarter-hour billing method has not been limited.[2] Therefore, I approve the quarter-hour minimum increments used by Claimant's counsel.

Although Employer's counsel did not specifically object to the hourly rate of $275, his objections to the value attached to the quarter-hour minimum increments necessarily contravene

[2] The claimant suffered an injury in California, which is under the jurisdictional purview of the United States Court of Appeals, Ninth Circuit. Only the Fifth Circuit has limited the quarter-hour billing method. *See Ingalls*, 904 F.2d 705 (5th Cir. 1990).

the hourly rate. The Secretary's regulation on fee petitions requires that the application state the attorney's "normal billing rate." 20 C.F.R. § 702.132(a). An employer may challenge the rate sought with proof of the customary fee for similar services in the local community. *Monahan v. Portland Stevedoring Co.,* 8 BRBS 653, 658 (1978). No affidavit or declaration was submitted with the petition or objection, so no evidence establishes the hourly billing rate of Claimant's counsel, or the rates of lawyers of similar quality in the San Diego area. *Cf*., *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1547 (9th Cir. 1992)(requiring that type of proof in a fee dispute under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000-5(k)). Supporting declarations or affidavits are not specifically required by the Secretary's regulation, but I do not infer that factual determinations on fee requests should be made without proof.

Claimant's counsel never claims he typically bills clients $275 per hour for his work. A prevailing rate derived from evidence of what lawyers in the community of similar experience and skill bill for hourly work may serve as a proxy for non-existent hourly rates. *Davis*, *supra*, 976 F.2d at 1548. Evidence of the hourly rate charged by other lawyers is unavailable, however. Without proof of an actual or proxy hourly rate, judges may set the rate based on familiarity with the awards currently made to lawyers in other Longshore cases. For experienced Longshore practitioners in major cities on the west coast, the rate currently hovers around $225 to $250 per hour. Based on the current rate, the quality of the representation, and the complexity of the legal issues, I approve a rate of $250 per hour.

*2. Entries on the fee petition that were not contained in the file*

Employer's counsel lists the following eight documents that are included in the fee petition but not in the file when he reviewed it:

| | **Description** | **Date** | **Time** |
|---|---|---|---|
| a. | Review letter from DOL | 2/1/02 | .25 |
| b. | Review letter from Patricia Haneff | 2/14/02 | .25 |
| c. | Review letter from Maryann Shirvell, Esq. | 10/11/02 | .25 |
| d. | Review letter from DOL | 1/12/04 | .25 |
| e. | Review letter from DOL | 5/7/04 | .25 |
| f. | Review letter from Phil Walker, Esq. | 7/13/04 | .25 |
| g. | Review letter from Maryann Shirvell | 5/17/05 | .25 |
| h. | Review letter from Phil Walker, Esq. | 7/22/05 | .25 |

Claimant's counsel gives no response to that objection. Without explanation as to their absence, I cannot approve time spent allegedly producing them. I deny attorney's fees for the following entries, totaling a reduction of 2.0 hours.

*3. Duplicate entries on the fee petition*

Employer's counsel lists three documents that are duplicate entries in the fee petition. Claimant's counsel concedes that there was one duplicate entry, thus leaving the other two open to dispute. I approve attorney's fees for one of the disputed entries. I deny them for the other disputed entry and for the duplicate entry, totaling a reduction of .50 hours.

*4. Entries relating to the civil action*

Generally, an attorney is not entitled to compensation under the LHWCA for time spent preparing a state workers' compensation suit. *Miller*, 14 BRBS 811; *Kimbell v. Rock Hall Marine Railway, Inc.*, 4 BRBS 389 (1976); *see also Swain v. Bath Iron Works Corporation and Commercial Union Insurance Company,* 14 BRBS 657 (1982) (remanding the case because the administrative law judge may only award fees for work performed at the administrative law judge level). However, a judge may award fees for work performed in connection with collateral services where "counsel shows that the same services and/or their products are necessary to, and are used in the prosecution of, the LHWCA claim." *Roach v. New York Protective Covering Co.,* 16 BRBS 114 (1984); *Eaddy v. R.C. Herd & Co.,* 13 BRBS 455 (1981); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 388 (1978); *Johnson v. Treyja, Inc.,* 5 BRBS 464 (1977); *Turner v. New Orleans (Gulfwide) Stevedores,* 5 BRBS 418 (1977), *rev'd on other grounds*, 661 F.2d 1031 (5th Cir**.** 1981).

Here, Employer's Counsel argues that the following work done by Claimant's counsel is not recoverable because it relates to the Claimant's civil action:

| | **Description** | **Date** | **Time** |
|---|---|---|---|
| a. | Letter to Client | 4/5/05 | .25 |
| b. | Deposition of Dr. George | 10/3/02 | 2.0 |
| c. | Deposition of Dr. Blake | 10/8/02 | 3.5 |
| d. | Deposition of Dr. Thomas | 10/21/02 | 2.5 |
| e. | Deposition of Dr. Robert | 11/4/02 | 2.5 |
| f. | Deposition of Dr. Barbara | 2/19/03 | 2.5 |

Claimant's counsel contends that the expert depositions taken for the civil action would have been taken in the Longshore matter if they had not been taken beforehand. These depositions are of the Claimant's treating doctors, one expert, and a vocational expert. These depositions were necessary to, and were used in the prosecution of, the LHWCA claim. Claimant's counsel did not respond to Employer's objection to the letter to client, dated April 5, 2005. Thus, I approve attorney's fees for the depositions. I deny them for the letter because Claimant's counsel failed to show how that was necessary to the LHWCA claim, totaling a reduction of .25 hours.

*5. Entries in the cost petition*

An administrative law judge has broad discretion to award a reasonable fee for testimony necessarily obtained, and this award will be reversed only if the appealing party shows it to be arbitrary, capricious or an abuse of the administrative law judge's discretion. *Pernell v. Capitol Hill Masonry,* 11 BRBS 532 (1979). *Topping v. Newport News Shipping and Dry Dock Company* 16 BRBS 40 (1983).

Employer's counsel argues that the cost of the deposition transcripts listed below are not recoverable because the following depositions were noticed in the civil action.

| | Description | Date | Cost |
|---|---|---|---|
| a. | Deposition Transcript – Elliott | Undated | $207.85 |
| b. | Deposition Transcript – Brizendine | Undated | $181.60 |
| c. | Deposition Transcript – Reese | Undated | $408.95 |
| d. | Deposition Transcript – Dossett | Undated | $327.80 |
| e. | Deposition Transcript – Thompson | Undated | $116.80 |
| f. | Deposition Transcript – Schweller | Undated | $117.70 |

Claimant's counsel responds that if these depositions had not been taken for the civil action, then they would have been taken in the Longshore action. Thus, the costs for the depositions were necessary and reasonable.

Employer's counsel also contests a $140.59 cost for a conference call operator because it lacks specificity, making it impossible to tell whether it is related to the Longshore action. Claimant's counsel responds by producing the bill and explaining that an operator's assistance was required to conduct an informal telephone conference before the OWCP on January 15, 2004. Thus, I approve the costs for the depositions and the conference call.

*6. Entries relating to the Claimant's workers' compensation action, and correspondence to the California Insurance Guarantee Association*

Claimant's counsel can be compensated for work done on a collateral action where it reduces time he would have spent on the Longshore claim, but this reduction must be reflected in the award. *Petro-Weld Inc., v. Luke*, 619 F.2d 418, 424 (5th Cir. 1980). An attorney may not be paid twice for the same work. *Roach v. New York Protective Covering Co*, 16 BRBS 114 (February 9, 1984).

Here, Employer's counsel argues that entries describing work relating to the Claimant's California workers' compensation action is not recoverable because that action is not resolved and all attorney fees and medical-legal expenses are awarded by the WCAB. Employer's counsel asserts that recovery in the Longshore action for services rendered in the state action could result in a greater award of attorney fees than what he would be entitled to under state law.

Claimant's counsel responds that the Employer continues to seek relief through the state action, and that the Employer has advised the Claimant that it will continue to seek assistance from the California Insurance Guarantee Association in paying for the Claimant's benefits. He contends that the parties agreed that the Claimant file an application in the state forum to assist the Employer's insurance carrier and foster resolution. He further alleges that he already represented to his opponent that the work would not be charged twice.

In general, an ALJ can award only attorney's fees for services performed before the OALJ. *See Revoir v. General Dynamics Corp*., 12 BRBS 524 (1980). In this case, however,

both parties specifically stipulated that I would resolve any dispute over services performed before both the OALJ and the OWCP.

This work on the state level was a necessary step to resolution of the Longshore claim. Therefore, based on the representation of Claimant's counsel that he will not charge for this work twice – which will likely require him to reduce the percentage of fees earned as an applicant's attorney in the event the Claimant prevails on the state level – I approve these fees. Claimant's counsel is awarded $27,250 in fees and $3,629.85 in costs from the Employer, based on the calculation below:

1) An hourly rate of $250; and
2) The total hours requested, 111.75, reduced by 2.75 (2.0 for missing documents + .50 for duplicate entries + .25 for work not shown to relate to the Longshore claim), equaling 109 hours.

Accordingly, based upon the entire record as well as the Stipulations entered upon the record between Claimant and Employer and the supporting exhibits submitted in support thereof, as accepted by the undersigned, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

**ORDER**

It is therefore **ORDERED** that:

1) Employer shall pay to the claimant compensation for his unscheduled injuries based on the average weekly wage and residual earning capacities for the time periods specified in the Stipulations hereinabove, with credit given for any amounts previously paid.

2) Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the claimant's work-related injuries may require, subject to the provisions of Section 7 of the Act.

3) Employer shall pay to Claimant's counsel the amount of $27,250 in fees, and $3,629.85 in costs.

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Russell D. Pulver
Administrative Law Judge